STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2004-52

April 16, 2004

VERIZON NEW ENGLAND INC. D/B/A VERIZON MAINE Request for Approval of Interconnection Agreement Dated July 17, 19 Between Verizon Maine and MCImetro Access Transmission Services LLC and New England Fiber Communications LLC (Amendment No. 2)

ORDER APPROVING AMENDMENT NO. 2

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

In this Order, we approve an amendment to an Interconnection Agreement between Verizon New England Inc. d/b/a Verizon Maine and MCImetro Access Transmission Services LLC and New England Fiber Communications LLC, pursuant to section 252 of the Telecommunications Act of 1996.

On August 27, 1997, in Docket No. 97-502, the Commission approved an interconnection agreement between New England Telephone and Telegraph Company d/b/a NYNEX and New England Fiber Communications, L.L.C. (NEFC). On August 1, 2000, NYNEX changed its name to Verizon New England Inc. d/b/a Verizon Maine. On November 13, 2002, in Docket No. 2002-599, the Commission approved Amendment No. 1 to the agreement, to add MCImetro Access Transmission Services, LLC (MCImetro) as a party to the agreement.

On January 23, 2004, Verizon Maine filed Amendment No. 2 to its agreement with NEFC and with MCImetro pursuant to 47 U.S.C. § 252, enacted by the Telecommunications Act of 1996. Section 252 allows interconnection agreements that provide for interconnection between an incumbent local exchange carrier (ILEC) and another telecommunications carrier, including a competitive local exchange carrier (CLEC). An interconnection agreement may allow a telecommunications carrier to purchase unbundled network elements or local services at a discounted wholesale rate (the discount reflecting avoided cost), or both, from an ILEC (or CLEC). The amendment provides for a new unitary intercarrier compensation rate.

Section 252(e)(2) states that a state commission may reject a negotiated agreement only if it finds that "the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement" or if "the implementation of such agreement or portion is not consistent with the public interest, convenience and necessity."

In response to a February 2, 2004 Notice of Agreement and Opportunity to Comment, Level(3) Communications, LLC (Level(3)) filed comments that characterized the amendment as "only part of a broader settlement of disputes between the respective parent companies of MCI and Verizon, in the context of the MCI bankruptcy reorganization." Level(3) suggested that if the Commission approves the amendment, "it should expressly state that the terms negotiated by these two parties are not necessarily in compliance with Section 251 and cannot serve as a precedent for any future arbitration conducted under that provision of federal law."

On February 18, 2004, the Hearing Examiner issued a Notice of Opportunity to Provide Further Comments that requested Verizon Maine, MCImetro, and Level(3) to address a number of questions related to Level(3)'s initial comments. MCImetro and NEFC (collectively "MCI") and Verizon Maine filed timely responses, and Level(3) provided timely Reply Comments in response to that Notice. The questions contained in the further notice were as follows:

1. Can the Commission lawfully find that a negotiated interconnection agreement is "not necessarily" in compliance with 47 U.S.C. § 251 and simultaneously approve the agreement?

2. Does the Commission have any authority to declare that its approval of a negotiated agreement under 47 U.S.C. § 252(e) is not precedential in a future arbitration proceeding? Would such a declaration be meaningful in light of the right, under 47 U.S.C. § 252(i), of other CLECs to obtain the same terms?

3. Were the terms of this agreement essentially required by the judgment of the bankruptcy court?

4. Does Verizon intend that the terms of the amendment to the MCImetro agreement be available to other CLECs?

5. Is it sound public policy to make these terms available to other CLECs? (*See* 47 U.S.C. § (e)(2)(B)(ii).) Or, if the terms were essentially required by the judgment of the bankruptcy court, should they be available only to parties (e.g., MCImetro) subject to that judgment?

6. If it is not sound public policy to allow these terms to be available to other CLECs, is there a lawful way to fashion this agreement (or implement the bankruptcy court's judgment) as something other than an interconnection agreement subject to the requirements of the 1996 TelAct?

In response to the Hearing Examiner's questions, MCI, Verizon, and Level(3) stated that the Commission can lawfully approve a negotiated interconnection agreement even if it does not comply with 47 U.S.C. § 251. All three commenters referred to 47 U.S.C. §

252(a)(1), which provides that carriers may enter into binding voluntary agreements "without regard to the [interconnection] standards set forth in subsections (b) and (c) of Section 251."

MCI and Verizon stated that the terms of the filed agreement were not required by a judgment of the bankruptcy court, and Level(3) stated that "the reasoning and judgment of the bankruptcy court are immaterial" to the issues now before the Commission.

Neither Verizon Maine, MCI, nor Level(3) alleged that the agreement is discriminatory or that implementation of the agreement would be inconsistent with the public interest – the only grounds that this Commission could apply to reject a negotiated agreement pursuant to Section 252(e)(2). We cannot make either of the findings set forth in Section 252(e)(2) for rejection, and we therefore approve the agreement amendment.

The question of the Commission's authority to declare that its approval of a negotiated agreement is not precedential in a future arbitration proceeding was the only one on which the commenters disagreed. MCI and Level(3) stated that the Commission has such authority, while Verizon said it would be inappropriate for the Commission to make such a declaration at this time because there are presently no facts before the Commission that would apply.

Our authority to reject a *negotiated* interconnection agreement is limited to the issues of whether the agreement discriminates against a telecommunications carrier that is not a party to the agreement or is contrary to the public interest. 47 U.S.C. § 252(e)(2)(A). The TelAct effectively requires us to approve a negotiated agreement if it does not violate either of these standards and both the ILEC and CLEC have agreed to the terms. By contrast, a state commission may reject an *arbitrated* agreement if it "does not meet the standards of Section 251." 47 U.S.C. § 252(e)(2)(B). Parties may agree to interconnection terms for a variety of reasons; they seek to advance their own private interests and do not need to consider (or do not care) whether the agreement is consistent with Section 251. That the parties have reached a negotiated agreement and that the Commission has not rejected the agreement (pursuant to the two narrow grounds available under the TelAct) do not suggest that we have found that substantive provisions of the agreement would constitute the best or even a reasonable result for a decision in an arbitrated proceeding. Accordingly, our approval of this agreement will not constitute precedent in future arbitration proceedings under 47 U.S.C. § 252(b).[1]

We reserve judgment on whether the rates contained in the amended agreement are reasonable from the perspective of Verizon Maine's retail ratepayers. Verizon Maine is presently under an alternative form of regulation (AFOR) ordered by the Commission in

[1] We note that cases before the Commission that are settled generally are not precedential. Indeed, most formal stipulations that are presented to the Commission state that the results therein shall not serve as precedent.

Docket No. 94-123. The AFOR began in December, 1995. Under the AFOR, Verizon Maine bears the risk of lost revenues resulting from rates that are too low. In Docket No. 99-851, we have continued the AFOR until May 31, 2006. We do not resolve whether Verizon Maine is receiving reasonable compensation from any CLECs that may avail themselves of the rates provided to NEFC and MCImetro, pursuant to 47 U.S.C. § 252(i).

The agreement amendment filed by Verizon Maine provides for interconnection between Verizon Maine's network in Maine and NEFC or MCImetro. If NEFC or MCImetro seek to interconnect with networks maintained by other incumbent local exchange carriers in Maine, they must seek a termination, suspension, or modification of the exemption contained in 47 U.S.C. 251(f)(1)(A).

ORDERING PARAGRAPHS

Accordingly, we

1. Approve Amendment No. 2 to the Interconnection Agreement between Verizon New England Inc. d/b/a Verizon Maine and MCImetro Access Transmission Services LLC and New England Fiber Communications LLC attached hereto, pursuant to 47 U.S.C. § 252(e); and

2. Order that the Administrative Director shall make a copy of the attached Amendment available for public inspection and copying pursuant to 47 C.F.R. § 252(h) within 10 days of the date of this Order.

Dated at Augusta, Maine, this 16th day of April, 2004.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.